

TESTIMONY OF CYNTHIA KOEHLER
LITTLE HOOVER COMMISSION HEARING
ON CALFED GOVERNANCE

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Thank you for the opportunity to discuss Calfed governance issues with you today.

Three years after enactment of the state authorizing legislation, and five years after the Record of Decision (ROD), it is not surprising that the governance structure, and the larger Calfed effort, are experiencing growing pains and revealing some structural flaws. Calfed was always a massive and ambitious undertaking. In addition, the ROD was more of a list than a plan, and it deferred many of the hardest choices to the future. Similarly, the State authorizing legislation (like most bills) was a set of political compromises rather than a textbook version of how to set up a new Bay-Delta agency. As difficult as this Commission's task is, you are fortunate in that you now have a track record to assess, and are thus in a strong position to recommend revisions to some of these initial choices.

From the macro perspective, Calfed's most significant problem is that it does not yet enjoy widespread, sustained popular and political support. The Chesapeake Bay and Everglades programs, whatever their flaws, enjoy substantial support because they are linked in the popular mind with beloved local resources that are also national treasures. Calfed has yet to make this connection for the public or the political establishment. This shortcoming has had critical ramifications for funding, the commitment of federal and state agencies, and the priorities of the relevant legislative bodies. As a first priority, this Commission should consider recommending that the program be renamed and refocused on restoration of the San Francisco Bay Estuary, a national jewel in its own right. Without a substantially higher political profile, it would be difficult for any structural fix to ensure the governmental resources and sustained commitment required for the Bay-Delta program.

At the same time, it does appear that a number of structural issues must be addressed as well. Some of the current problems appear to be rooted in the same types of issues that have plagued other large-scale water conflicts nationwide:

- program goals are unclear and vague (or perceived as such);
- there are no enforceable mandates for agencies to carry out;
- it is not clear who is in charge and where responsibility for achieving results lies;
- stakeholders are pressing for contradictory actions and outcomes;
- there is no specific accountability for failure and little incentive to achieve success.

Many of these problems can be addressed with changes to the authorizing legislation assuming that there is the political will to do so. For example, long-standing programs in the Chesapeake Bay and elsewhere have produced science programs that are widely regarded as credible and trustworthy. As such they are able to provide starting and

measuring points for complex and difficult restoration efforts. While there is a strong consensus that such a science program is needed for Calfed, it has been difficult to achieve.

While I was Legal Director at Save The Bay, we conducted an extensive study of large scale restoration efforts similar to Calfed. The purpose of the study, entitled *Putting It Back Together: Making Ecosystem Restoration Work* (June 2001), was to extract information about what worked and what did not in other regions in order to develop a legislative proposal for California. The final report was extensively reviewed by those actively involved in those efforts, and by independent experts. I have provided copies of the full report to your staff and I understand that the Commission has been provided copies of the executive summary. In addition the report can be downloaded from the Save The Bay website: http://www.savesfbay.org/atf/cf/{2D306CC1-EF35-48CC-B523-32B03A970AE5}/PIBT_Report.pdf

After reviewing your briefing paper on 'Calfed Governance Issues,' I believe our study and proposals for governance are extremely relevant to your work today. We evaluated six areas with major resource conflicts including:

- * Columbia River Basin
- * Everglades
- * Great Lakes
- * Chesapeake Bay
- * Upper Colorado River Basin
- * Delaware River Basin

There is no one perfect model currently in existence. All of the programs were falling short of meeting ecosystem restoration and other objectives. A few of the trends that we noticed over most or all of these efforts may appear familiar:

- * Ecological problems are exacerbated by the institutional structure; water development and natural resource agencies were not designed to work in partnerships with each other.
- * A complex patchwork of programs to address different parts of the problem develops over time.
- * The best solutions to address the environmental crisis are the most politically controversial (usually involving providing additional water to the ecosystem at the expense of a development interest) and therefore are not implemented.
- * Consensus processes result in 'lowest-common-denominator' responses that deal with problems around the margins, but do not resolve, them thus prolonging and increasing the cost of the conflict.
- * The scientific process turns into another political forum; 'good science' becomes a euphemism for partisan science.

- * Progress is impeded by both conflicts over agency control and lack of agency accountability for the program.
- * There is substantial political imbalance within the stakeholder community.
- * Everyone talks about ‘adaptive management,’ but no one knows how to do it.

At the same time, each of these efforts had produced important innovations, particularly with regard to creative institutional approaches, that were working well. I encourage you to review the case studies which are organized to provide a quick snapshot of the environmental and political situation in each area as well as an overview of the governance regime adopted, including the key institutional features. Each case study has a ‘Lessons Learned’ section as well.

The case studies collected, and the lessons learned, led us to develop a twelve step proposal for an institutional structure that would have a greater chance at success. While some of these recommendations may seem beyond the governance mandate, they are part and parcel of any institutional solution:

1. Make Environmental Water Real. Restoring water for ecological purposes has been the downfall of most of these programs. Restoration efforts are often predicated on funding but have rarely produced the critical water resources necessary to resolve environmental conflicts. The 2000 Everglades Act took a fresh approach; the federal legislation required that any new water storage must allocate water to the natural system. The extent to which this mandate will be enforced, or is legally enforceable, is not yet clear. Other approaches include instream water rights and long-term water acquisitions. However, without a specific institutional mechanism for guaranteeing water to the environment for the long-term, conflicts will continue regardless of funding levels.

2. Provide Dedicated Funding. Financial reliability is the lifeblood of these large-scale, long-term efforts. As widely anticipated, the projected Bay-Delta funding did not materialize and is a major factor in the problems facing the program today. Potential funding mechanisms include dedicated funds from resource use (e.g., the Land and Water Conservation Fund), dedicated user fees and privately managed endowments. It will never be possible to fully finance a program of Calfed’s size through a dedicated fund of any one kind. Nevertheless, if a dedicated fund of some size could be established, the program would be able to weather political downturns and would have the long-term sustainability, potentially, to solve problems. At the same time, while funding is a necessary condition of success, it is not alone sufficient as the very well-funded, but as yet unsuccessful salmon restoration effort on the Columbia River makes clear.

3. Create a Credible and Well-Supported Independent Science Program. Calfed reflects the pervasive problem of scientific disputes which can paralyze action for years and even decades. The Columbia River and Everglades experiences indicate that independent scientific review can move the discussion forward, but the respective roles of science advisors and policy makers must be clearly and precisely drawn. In particular:

- The scientific panel should not be politically appointed but instead recommended by a neutral and credible arbiter, such as the National Science Foundation.
- Conflict of interest requirements should be established for members.
- There should be a bright line between the technical/informational purposes of the science panel and policy making.
- There should be a clear role for internal agency experts who are often the most knowledgeable in the field.

4. Engage Stakeholders Appropriately. Finding a productive role for stakeholders is an issue for every large-scale ecosystem conflict we studied. The difficulty is that a *pro forma* role is unsatisfactory to the stakeholders who invariably want control over the program, while giving these interests substantial decisional authority severely limits accountability to the general public and does not ensure equitable resolution of conflicts. The South Florida Ecosystem Restoration Task Force provides the best example so far of a successful stakeholder approach (although, like all of the others, it has its critics). Key elements include:

- Assign the group a task that will have a meaningful impact on decision-making.
- Recruit a leader of public stature who is widely trusted and respected.
- Recruit a leader with a strong personal commitment to the restoration mission.
- Include everyone with an interest and ensure parity of numbers.
- Require unanimity for (major) recommendations.
- Establish a feedback loop forcing agencies to show that they have adopted the committee's recommendations or to explain why they have not.

5. Establish a Mandate. The most critical step in ensuring agency accountability and ownership for a program is an unequivocal, and enforceable, legislative directive to accomplish a specific task. The mandate must communicate the legislature's intent to change the status quo and to actually achieve the stated objective.

6. Demand Performance. Measurable progress toward clearly defined objectives is key. The Upper Colorado Basin Recovery and Chesapeake Bay Programs in particular provide good models for establishing quantifiable targets and time lines. These are critical for agency accountability. Efforts without the focus such targets provide have generally gotten off track. Legislation should create a timetable for the establishment of specific ecological objectives, measurable indicators of progress toward achieving those objectives, demonstrable links between actions taken by the agencies and achievement of indicators and objectives and schedules for the implementation of actions.

7. Ensure Spending Accountability. Financial transparency has important benefits for the legislature and the public, particularly for a program as complex as CalFed which has items in many agencies' budgets. Several mechanisms can make financial accountability accessible and informative:

- Annual cross cut budgets showing spending by all agencies on related efforts.
- Integrated financial plans showing spending by projects.
- Independent auditing of restoration expenditures

- Independent auditing of success or progress in achieving restoration targets.

8. Assign Responsibility To The Agency Best Equipped To Do The Job.

Fragmentation of responsibility for restoration is a major factor in dispute, delay and inefficiency. Restoration efforts have been most smoothly implemented when authority for planning and spending are consolidated within an entity with the required tools, such as the Delaware Basin Commission or the Recovery Implementation Program in Colorado. Clear legal authority and funding should be consolidated in a strong restoration entity. That entity should have the commitment and expertise to accomplish restoration objectives, without conflicting responsibilities.

9. Forge Water Development/Natural Resource Agency Cooperation. Historically, water resources agencies have often had difficult, and unbalanced, relationships with fish and wildlife agencies. The long Calfed process has in many ways broken through these barriers and ushered in a new era of inter-agency cooperation. Institutional mechanisms to support agency parity, cooperation and consensus building over the long term are important. In particular, a formal process for resolving inter-agency disputes could be quite valuable.

10. Forge Federal/State Government Partnerships. Successful restoration will require a productively re-engaged federal government. While the state is ground zero for the effort, major national interests and legal prerogatives are at play. Without a strong sense of federal ownership and accountability for Calfed it is likely to whither further.

11. Require Consistency With The Program. Development of water supplies, and water project operations, affecting the environment must be compatible with restoration objectives. Otherwise, conflicting mandates between agencies fuel stakeholder as well as inter-agency disputes. The Delaware Basin project review process was the best model that we found to address this issue.

12. Revise the Concept of ‘Getting Better Together:’ Establish Ties Between Program Elements. Like Calfed, many programs have premised ecosystem restoration efforts on the provision of consumptive use benefits such as “regulatory relief” or increases in water supplies. As we are beginning to see with the Bay-Delta, these benefits have been difficult to implement without undermining restoration efforts. What was intended as a conditional benefit quickly turns into a political entitlement that cannot be touched even when the restoration end of the bargain is not upheld. Key principles for truly “getting better together” concept include:

- Conditioning consumptive-use benefits on actual (as opposed to proposed) achievement of quantifiable ecosystem objectives within a specific time frame.
- Establish that consumptive benefits are not legal entitlements and will not materialize if the required ecosystem targets are not met.
- Require certification that water development proposals are consistent with implementation of the restoration program and objectives.

Taken together, these recommendations could make a substantial difference in Calfed's ability to accomplish the lofty objectives set for itself. At the hearing, if appropriate, I will be happy to provide the Commission with a more detailed set of recommendations about how to apply these recommendations and lessons learned to a revised Bay-Delta governance structure.

In closing, I found in the course of preparing this testimony a number of people involved with this process concerned or disheartened by litigation and legislative efforts "outside of Calfed" designed to affect, influence or change the program or its outcomes. Without commenting on the merits of those efforts either way, it appears that they are unavoidable. Consensus processes are inherently about compromise, or giving up some part of one's political agenda. To the extent that any party in the process perceives an avenue for advancing their agenda more effectively through political or judicial avenues, it is reasonable to assume that they will avail themselves of those opportunities. Notwithstanding its popularity, experience demonstrates that consensus only works when the parties involved are confident that it provides the best opportunity for achieving their objectives (or alternatively, that other routes toward achieving those objectives are irrevocably blocked). The question is whether the Bay-Delta program can regain the consensus status of the 1994 Bay-Delta Accord, which in fact represented a true compromise by virtually all parties involved.

Thank you very much for your attention and I look forward to answering any questions you may have.